



Paper No. 6

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In re Application of
Janik, et al.
Application No. 10/052,057
Filed: October 19, 2001
Attorney Docket No. 5532.P020
For: AUTOMOTIVE STORAGE AND
PLAYBACK DEVICE AND METHOD
FOR USING THE SAME

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: DECISION ON
: PETITION
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This is a decision on the petition, filed May 20, 2002, requesting that page 2 of the specification be accorded a filing date of October 19, 2001.

The application was filed on October 19, 2001. On March 18, 2002, the Office of Initial Patent Examination mailed a "Notice to File Missing Parts of Nonprovisional Application" informing petitioners, *inter alia*, that page 2 of the specification appeared to have been omitted.

In response to the Notice, petitioners timely filed the present petition. Petitioners request the October 19, 2001 filing date for page 26 on the basis that the allegedly omitted page was received in the Patent and Trademark Office (PTO) on October 19, 2001. In support, the petition is accompanied by a declaration of the attorney of record who reviewed the application and attests to the fact that page 2 was present upon mailing and applicants' Express Mail label with a date-in of October 19, 2001.

The declaration by counsel submitted with the petition states without equivocation or doubt that she checked the assembled application papers to determine that the application included all pages of the specification and that page 2 was deposited into the envelope along with the rest of the application papers.

The Office file is the official record of what was mailed by Express Mail or filed on October 19, 2001. An applicant alleging that a paper was filed in the Office and later misplaced has the burden of proving the allegation by a preponderance of the evidence. In this regard, declarations by individuals involved in the preparation and mailing of the original application reciting their personal recollection or belief of what was contained in the application that they reviewed and/or mailed are no more persuasive of what was actually mailed than the contents of the official record. Such declarations, as in this case, are usually made months after the actual events recited.

In this case, the declaration executed on May 16, 2002 was made more seven (7) months after the application was actually mailed.

It is for this reason that the Office has established a practice of providing a receipt for papers filed in the Office to any applicant desiring a receipt. The practice, which was long ago established and is well publicized, requires that any paper for which a receipt is desired be filed in the Office with a self-addressed postcard identifying the paper. A postcard receipt which itemizes and properly identifies the papers which are being filed serves as prima facie evidence of receipt in the Office of all the items listed thereon on the date stamped thereon by the Office. See section 503, Manual Of Patent Examining Procedure (MPEP 503).

To reiterate, a properly itemized return postcard constitutes *prima facie* evidence that the items were filed on the date stamped thereon. It is noted that petitioners have not submitted their copy of the return postcard receipt. Petitioners are strongly urged to do so.

Regarding petitioners' Express Mail argument, petitioners are advised that the provisions of 37 CFR 1.10(e) cannot be utilized to prove the contents of a mailing. MPEP 513 states, "Where there is a dispute as to the contents of correspondence submitted to the Office,...an applicant may not rely upon the provisions of 37 CFR 1.10(e) to establish what document(s)... were filed in the Office with such correspondence. Rather, where the records of the Office (e.g. the file of the application) contain any document(s)... corresponding to the contents of the correspondence at issue, the Office will rely upon its official record of the contents of such correspondence in absence of convincing evidence (e.g., a postcard receipt under MPEP 503 containing specific itemization of the document(s)... purported to have been filed with the correspondence at issue) that the Office received and misplaced any document(s).. that is not among the official records of the Office."

As stated above, petitioners are urged to submit their copy of the date stamped postcard receipt.

Since page 2 was not a part of the papers filed on October 19, 2001, the application cannot be accorded the October 19, 2001 filing date with page 2 as a part of the original disclosure of this application.

The petition is dismissed.

Of course, applicants may submit page 2 in the form of an amendment (see 37 CFR 1.121) for consideration by the examiner to determine whether or not the page contains new matter compared to the original specification on October 19, 2001.

The application is being returned to the Office of Initial Patent Examination for further processing with a filing date of October 19, 2001. Page 2, submitted with the instant petition will **not** be considered part of the original filing. The Office acknowledges receipt of 21 pages of

substitute drawings, an executed declaration, and a surcharge for the late filing of the declaration.

Any inquiries pertaining to this matter may be directed to the undersigned at (703) 308-6712.

A handwritten signature in black ink, appearing to read "E. Shirene Willis". The signature is written in a cursive, flowing style.

E. Shirene Willis
Petitions Attorney
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy